IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1749 of 1985

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DAHYALAL M PATEL

Versus

NARESHBHAI K PANDYA

Appearance:

MR MEHUL S SHAH for the Petitioner

MR B.P.GUPTA FOR MR Y.N.OZA for the Respondent

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 17/09/2002

ORAL JUDGEMENT

This Revision Application preferred under Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as 'the Rent

Act') arises from the judgment and order dated 28th August, 1985 passed by the learned Assistant Judge, Bharuch in Regular Civil Appeal No.136/1984. The petitioner before this Court is the appellant - defendant.

The respondent no.1 herein (hereinafter referred to as 'the plaintiff') instituted Regular Civil Suit No.159/1983 in the Court of Civil Judge (J.D.), Rajpipla. The plaintiff claimed that he was the owner of a residential building being House No.107 situated at Rajpipla. The ground floor of the said building (hereinafter referred to as 'the suit premises') was leased to the defendant for a monthly rent of Rs.100=00. The municipal taxes for the said house were borne by the plaintiff. The defendant was in arrears of rent since 1st March, 1982. The plaintiff, on 29th August, 1983, gave notice (Ex.38) as envisaged under sub section (2) of Section 12 of the Rent Act. The plaintiff terminated the tenancy of the defendant and demanded the arrears of rent due i.e. for the period from 1st March, 1982 to 30th July, 1983. The said notice was sent to the defendant by registered post twice. However, on both the occasions the registered post was delivered back to the plaintiff. The plaintiff thereafter served the suit notice to the defendant personally on 2nd October, 1983. The said notice was duly replied to (reply Ex.42) by the defendant. Inspite of the receipt of the suit notice, the defendant failed to pay the amount of arrears of rent and to handover the vacant possession of the suit premises to the plaintiff. Therefore, the suit for eviction, arrears of rent, mesne profits and the cost.

The suit was contested by the defendant by filing written statement (Ex.11). The defendant denied the previous two service of the suit notice. However, admitted that the suit notice was received by him on 2nd October, 1983. The defendant admitted that he was the tenant of the suit premises for a monthly rent of Rs.100=00. However, he claimed that the rent was collected every year and not every month, and therefore, the rent can not be said to be payable by month. The defendant also admitted that he was in arrears of rent since 1st March, 1982. The defendant stated that he was ready and willing to pay the arrears of rent, however, he could not pay the same on account of failure of the crop.

The learned trial Judge was, considering the evidence on record, pleased to hold that the rent of the suit premises was payable by month; that on the date of the suit notice the defendant was in arrears of rent for

six months and more; that the defendant had neglected to pay the amount of arrears of rent until the expiration of one month from the date of the receipt of the suit notice; and that there was no dispute as regards the standard rent of the suit premises.

In view of the above findings, the learned trial Judge, under his judgment and order dated 13th July, 1984, proceeded to pass decree, inter alia, for possession of the suit premises and the amount of arrears of rent.

Feeling aggrieved, the defendant preferred Regular Civil Appeal No.136/1984 in the Court of District Judge, Bharuch. The learned Assistant Judge, Bharuch heard the said appeal. Under the impugned judgment and order dated 28th August, 1985 the learned Assistant Judge was pleased to confirm the findings recorded by the trial Court. Consequently, the appeal was dismissed. Feeling aggrieved, the defendant has preferred the present Revision Application.

Mr.Shah has submitted that both the Courts below have committed a manifest error in holding that the plaintiff's claim for eviction was covered by Section 12(3)(a) of the Rent Act and in passing the decree for possession. He has submitted that on the facts of the case the rent can not be said to be payable by month. The decree for possession, therefore, could not have been passed as envisaged under Section 12(3)(a) of the Rent Act. Mr.Shah has submitted that one of the conditions precedent to attract the provisions of Section 12(3)(a) of the Rent Act is that the rent should be payable by month. In the present case, though the rent was payable by month the defendant was also liable to pay education cess. As held by this Court, the education cess if payable by the tenant should be considered to be permitted increase and shall, as such, form part of the rent. The education cess not being payable every month atleast part of the rent is not payable every month. Hence, the rent can not be said to be payable by month. No decree for possession under Section 12(3)(a) of the Rent Act could, therefore, have been passed as has been done by the Courts below. In support of this argument, Mr.Shah has relied upon the rent receipts produced at exhibits 30 to 32 and 80. Ex.80 is the counter-foil of the rent paid by the defendant on 1st April, 1979 for the period from December, 1977 to March, 1978. Alongwith the rent of Rs.400=00, the defendant has paid education cess of Rs.28=50 for the year 1977-78. Similarly, Ex.30 is the receipt for the rent paid for the period from April,

1979 to December, 1979. Overleaf the said receipt an endorsement has been made that the education cess for the years 1979-80 and 1980-81 was outstanding. Ex.31 also is the receipt for the rent paid for the period from January, 1980 to October, 1980. Endorsement of outstanding amount of education cess has been made overleaf receipt Ex.31. Ex.32 is the receipt for the rent paid for the period from November, 1980 to November, 1981. Alongwith the said rent, the defendant also paid a sum of Rs.85=50 being the amount of education cess for three years i.e. 1980-81, 1981-82 and 1982-83. Mr.Shah has submitted that there being no rent note, it has to be culled from these documents that over and above the monthly rent of Rs.100=00 the defendant was liable to pay education cess. He has also relied upon the judgments of this Court in the matters of VANLILA VADILAL SHAH V/S. MAHENDRAKUMAR J.SHAH & ANR. [16 G.L.R. 71] and of DAYALAL GANGARAM V/S. BHIMANI BHUPATRAI CHUNILAL & ANR. [18 G.L.R. 349] and of the Hon'ble Supreme Court in the matter of RAJU KAKARA SHETTY V/S. RAMESH PRATAPRAO SHIROLE & ANR. [(1991)1 S.C.C. 570].

In the matter of Vanlila Vadilal Shah (supra), the Single Judge Bench of this Court has held that "I feel no hesitation in reaching the conclusion that this education cess, which ultimately becomes payable by the tenant, is a part of the rent. It is not on account of any contract, but it is on account of the statutory provision of the Act." Having held thus the Court proceeded further to hold that "There is no mention made that there was any agreement to pay this part of the rent every month which would be deemed to be a part of the rent, as stated by me above, in view of the statutory provisions of the Act. Admittedly, such tax is not levied monthly by local authorities. It is stated that it is levied quarterly, or half yearly, and by some authorities annually. There is no evidence also suggesting any such agreement. It cannot, therefore, be said that this part of the rent was payable by month." The Court ultimately concluded that "The net result, in view of the aforesaid decision, is that in the instant case it cannot be said that the rent was payable by month so that the provisions of Section 12(3)(a) of the Act would be attracted.....Tenant has admittedly complied with the conditions of that sub section (reference is to the Section 12(3)(b) of the Rent Act) and was, therefore, entitled to protection under Section 12(3)(b) of the Act."

This view has been confirmed by the Division Bench in the matter of Dayalal Gangaram (supra). The

same is the view expressed by the Hon'ble Supreme Court in the matter of Raju Kakara Shetty (supra).

Though neither the suit notice nor the plaint nor the written statement or the evidence of either of the plaintiff or of the defendant has referred to the education cess. The above referred documents exhibits 30 to 32 and 80 establish that over and above the agreed rent of Rs.100=00 per month the defendant was also liable to pay education cess and that the education cess was payable every year. Thus, as held in the aforesaid rulings, education cess should be held to be part of the rent payable by the defendant, such part being not payable every month. Hence, in the present case, the provisions contained in Section 12(3)(a) of the Rent Act could not have been invoked nor could the Courts below have passed the decree for possession as envisaged under the said Section 12(3)(a). It appears that both the Courts below have fallen in error in concentrating over the service charge of Rs.20=00 charged every month i.e. whether the said amount was charged towards the municipal taxes or not. Even, the learned advocates have not drawn the pointed attention of the Courts below over the liability of the defendant to pay education cess in addition to the agreed rent.

Since no decree for eviction could have been passed under Section 12(3)(a) of the Rent Act, it would be the duty of the Court to examine whether the plaintiff's claim for possession could have been upheld under Section 12(1) of the Rent Act. Since both the Courts below have passed decree for possession under Section 12(3)(a) of the Rent Act, this aspect has not been examined at all.

In the circumstances, the Revision Application is partly allowed. The impugned judgment and order dated 28th August, 1985 passed by the learned Extra Assistant Judge, Bharuch in Regular Civil Appeal No.136/1984 and the judgment and order dated 13th July, 1984 passed by the learned Civil Judge (J.D.), Rajpipla in Regular Civil Suit No.159/1983 are quashed and set aside. The Regular Civil Suit No.159/1983 is remanded to the learned Civil Judge (J.D.), Rajpipla to examine whether the defendant has complied with the conditions specified in Section 12(3)(b) of the Rent Act so as to invoke the protection granted thereunder and to pass necessary orders. Rule is made absolute to the above extent. The parties shall bear their own costs. The parties may approach the learned Judge for expeditious hearing.

(Ms. R.M. Doshit, J.)

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